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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 267

ARLIE MITCHELL and JAMES ROGERS, *Petitioners,*

v.

MALVERN GRAVEL COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas, entered in the above-entitled case on December 21, 1964.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 238 Ark. 848, 385 S.W. 2d 144. It is reproduced herein as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on December 21, 1964; a petition of rehearing was denied on January 18, 1965; Mr. Justice White entered an order on April 10, 1965 granting petitioners' motion for extension of time within which

to file a petition for certiorari to and including June 17, 1965. The Federal question was timely raised by way of pleading, petitioners having brought suit under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. § 51 et seq. The judgment of the Supreme Court of Arkansas, two justices dissenting, reversed the jury verdict rendered in the Hot Spring Circuit Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did the Supreme Court of Arkansas improperly deprive petitioners of their right to a jury determination under the Federal Employers' Liability Act by reversing the jury verdicts in favor of petitioners and by holding that there was not "substantial evidence" that respondent, Malvern Gravel Company, is a common carrier within the meaning of the Act?

STATUTE INVOLVED

45 U.S.C. § 51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, . . . or other equipment . . . .

45 U.S.C. § 57

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons

or corporations charged with the duty of the management and operation of the business of a common carrier.

STATEMENT OF THE CASE

Petitioners Arlie Mitchell and James Rodgers, employees of respondent, Malvern Gravel Company, while under a railroad car trying to close a defective hopper door, were badly mangled and severely injured as a result of being run over by the car. The car had been struck by a string of loaded gravel cars, which had been negligently kicked down the track by an engine operated by another employee of respondent. (R. 9; 27).[1]

Petitioners sued respondent, Malvern Gravel Company, the Missouri Pacific Railroad and the Malvern & Ouachita River Railroad Company (plus the Rock Island Railroad against whom a nonsuit was taken) in the Arkansas State Circuit Court under the Federal Employers' Liability Act, alleging that respondents were common carriers and liable to them under the Act for the negligence which caused their injuries.[2]

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[1] Record citations herein are to the Abstract of Record, filed in the Arkansas Supreme Court, ten copies of which were filed in this Court.

[2] The trial court directed a verdict in favor of the Malvern & Ouachita River Railroad. It also denied respondent's timely motions for directed verdict and judgment notwithstanding the verdict for the reasons that the "question of whether Malvern Gravel Company is a common carrier by rail is a factual matter to be determined by the jury;" because there was "evidence from which the jury could infer that the general public had a right to demand use of the railroad lines;" because other "individuals and companies had use of the track, from which the jury could infer that the other land owners along the track might erect some industry that could demand and be entitled to use of the track;" and because "the track extends across lands of others for more than a mile from the Malvern Gravel Company plant." (R. 31-32).

After a jury trial petitioners each recovered verdicts of $200,000 against the Missouri Pacific Railroad Company and the Malvern Gravel Company, the jury finding unanimously on special interrogatories that respondent gravel company was a common carrier and that petitioners had been injured by the negligence of respondent and the Missouri Pacific.[3]

Respondent, located in Malvern, Arkansas, is a producer and seller of sand, gravel and crushed stone. It has for many years leased from the Malvern and Ouachita River Railroad [hereinafter cited as M.&O. R.R.] certain rights-of-way, trackage, train engines and cars, all of which it has used in the shipping of its products by rail. Respondent gravel company has also laid additional track on this right-of-way and elsewhere, using material leased from the Missouri Pacific, all of which is connected and is an integral part of that track leased from the M.&O. R.R.[4] The Supreme Court of Arkansas found that respondents are in interstate commerce. (App. 4a).

The gravel company moves its products from its plant over the previously noted right-of-way which it had leased from the M.&O. R.R. to a set-off track near the main lines of the Missouri Pacific and Rock Island. The tracks over which Malvern does its switching are about two miles long. It has one switch engine which it leases from the M.&O. R.R.

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[3] Petitioners had previously been awarded medical expenses (aggregating approximately $13,000) and compensation (aggregating approximately $4,500) under the Arkansas Workmen's Compensation law. The Missouri Pacific settled the judgment against it.

[4] The evidence related herein from page 4 to page 5 is found generally at (R. 43-51; 60-69).

Petitioners were employed by Malvern Gravel Company at the time of the accident. Their principal duties were to maintain the railroad track and to clean and prepare railroad cars for loading and shipment of sand and gravel and other materials by respondent. On occasion, petitioner Arlie Mitchell worked on the train engine crew of respondent in the switching and handling of railroad cars. (R. 52; 54; 57).

The string of cars which struck the car under which petitioners were working was owned by the Missouri Pacific and was switched onto respondent's property by this railroad. Respondent has never carried any passengers for which a charge was made. So far as the record reflects, it never handled any freight for anyone for which a direct charge was made, although it did handle interstate freight on a number of occasions for others.

The Supreme Court of Arkansas, in reversing the jury determination, held that there was not substantial evidence in the record to take to the jury the question of whether respondent Malvern Gravel Company was a common carrier under the Federal Employers' Liability Act. Petitioners respectfully submit that in so deciding the Arkansas Court committed error, which should be reversed by this Court.[5]

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[5] Even if it were to be found that this is a question of law—something which petitioners certainly do not concede—rather than of fact, petitioners submit that, based on the evidence of record, the court would be bound to find that respondent was a common carrier.

REASONS FOR GRANTING THE WRIT

I.

This petition brings before this Court the important question of what activities a railroad must perform in order for it to be considered a "common carrier" within the meaning of that term as used in the FELA. This Court has never considered the question of whether a wholly "in-plant" railroad is within the purview of the Act; nor has it considered the question of whether a railroad in respondent's position, i.e., an essentially in-plant facility which performs transporting functions for other individuals and corporations, is a common carrier within the meaning of the Act. Indeed, in the fifty-seven years the present FELA has been on the books this Court has only considered the common carrier question on one occasion, *Wells Fargo & Co.* v. *Taylor,* 254 U.S. 175, and there it merely decided that the express company which maintained facilities in one car of a train was not a "common carrier" under the Act.

The Supreme Court of Arkansas has in this case decided an important Federal question which this Court has never passed upon and, petitioners submit, in a manner and spirit not in accord with recent decisions of this Court construing the broad remedial provisions of the Act. The question presented is important to all industrial concerns maintaining railroad facilities. It is important to all employees of these concerns who, though they perform precisely the same functions as employees on conventional railroads, and though they are exposed to the same dangers and risks which prompted Congress to pass the Act, find

themselves cut off from the protection of the FELA by this decision.

Although this Court has never considered the question herein proposed, lower Federal courts have considered it in varying contexts. The decision of the Supreme Court of Arkansas is in conflict with a Federal court decision, *Kach* v. *Monesson Southwestern Ry. Co.,* 151 F.2d 400 (3d Cir. 1945), where, on facts strikingly similar to those present here, the common carrier status of the railroad was admitted. Further, the factual situation in the instant case is entirely distinguishable from the several Federal cases which have construed the "in-plant" common carrier question, which cases the Supreme Court of Arkansas relied upon in rationalizing its decision.

II.

This Court has been increasingly concerned in recent years in preserving to litigants their constitutionally guaranteed right to a jury trial. *Beacon Theatres* v. *Westover,* 359 U.S. 500; *Dairy Queen* v. *Wood,* 369 U.S. 469; *Byrd* v. *Blue Ridge Rural Elec. Coop,* 356 U.S. 525; *Simler* v. *Conner,* 372 U.S. 221. Perhaps the most outstanding manifestation of the Court's concern for preserving this right to jury trial has been its frequent review of sufficiency-of-the evidence cases under the Federal Employers' Liability Act. The Court has remained

> cognizant of its duty to effectuate the intention of Congress that litigants should have a right to a jury determination under the Act, . . . [and has been] vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination.

Rogers v. *Missouri P.R. Co.*, 352 U.S. 500, 509. See generally Anno: FELA—Sufficiency of Evidence, 4 L. ed 2d 1787.

Although the issue in this case is somewhat novel in comparison to those generally considered by the Court in FELA cases in recent years, it is nonetheless a "case where it appears that the litigants have been improperly deprived of [a jury] determination." The Arkansas Supreme Court's decision is in direct conflict with the congressional policy underlying the Act:

> If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act. *Parden* v. *Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 189-90.

This Court should hear and decide this important question.

III.

Before a discussion of the evidence which petitioners believe was sufficient to take to the jury the question of respondent's status as a common carrier, it is necessary to demonstrate conclusively that the M.&O. R.R. and the Malvern Gravel Company are in fact one and the same entity. It is necessary at the outset to make this demonstration because some of the acts which will be catalogued, *infra,* proving that Malvern Gravel Company performed sufficient acts as a common car-

rier to make this a question for the jury, were technically performed by its alter ego, the M.&O. R.R.

In piercing the fiction of the corporate entity the dissent in the Supreme Court of Arkansas exhaustively reviewed the evidence in the record demonstrating the oneness of the two corporations concluding that "the evidence is clear that Malvern Gravel Company and Malvern & Ouachita River Railroad were one and the same corporation, and that Malvern Gravel Company was a carrier engaged in interstate commerce." (App. 15a). For sake of brevity, the evidence relating to this very unique "railroad" will only be summarized here without elaborate discussion.

1. The two companies have the same president, and the same directors; the gravel company owns 97% of the stock of the railroad company; the other three per cent is held by the president, his wife, and one other individual. By the admission of its president, it was nothing more than a "book corporation." (App. 11-13a).
2. The only reason the railroad was incorporated was to condemn the right-of-way from the plant site to the Missouri Pacific switching yards. It has no employees. *Id.* (R. 45).
3. The gravel company leases all of the facilities of the railroad company and pays it $2,500 per year, its only income. (App. 13a).
4. The contract between the Missouri Pacific and the M.&O. R.R. represents the parties (the gravel company and the M.&O. R.R.) as being the same. (App. 10a).
5. The gravel company leases track materials from the Missouri Pacific and in fact laid and uses such track although its charter did not authorize it to lay a railroad track. (App. 3-4a; 16a).

This Court has pierced the veil of supposed separate railroad corporations in circumstances similar to those present here. *Chicago, Milwaukee & St. P.R. Co.* v. *Minneapolis Civic Ass'n.*, 247 U.S. 490. The Arkansas Supreme Court "has pierced the fiction of the corporate entity when justice so demanded." (cases cited, App. 15a).

Further, it is apparent that the Congress itself contemplated relationships such as that existing between the gravel company and the M.&O.R.R. when it enacted Section 57 of the FELA.

> The term "common carrier" as used in this chapter shall include the receiver or receivers *or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.* (Emphasis added.)

A lower Federal court has recognized this principle in a factual situation closely analogous to that presented here. In *Eddings* v. *Collins Pine Co.*, 140 F. Supp. 622 the District Court for the Northern District of California, construing Section 57, held that a lumber corporation which wholly owned and controlled a railroad corporation was itself a "common carrier" within the meaning of the FELA. The point need not be further belabored here; the two supposed separate and distinct entities in this case are in fact, one. Constant adversion to this fact would unnecessarily lengthen this petition. Hereafter, when Malvern Gravel Company is referenced, read Malvern Gravel Company and the M.&O. R.R.

IV.

We turn finally to the question of whether, under the peculiar factual circumstances of this case, the

question of respondent's status as a common carrier was a factual issue properly to be left within the province of the jury, or whether it was a question of law, determinable by the court.

It is interesting to note the handling of this issue by the Supreme Court of Arkansas. It did not hold that the question of common carrier status was in all cases a matter of law. On the contrary, it recognized that it could be a question for the jury, so long as there was "substantial evidence that the gravel company was a common carrier." (App. 1a). Once having properly made this recognition, the court thereafter fell into error by substituting its judgment for that of the jury with respect to the conclusions to be drawn from the facts in evidence, thereby improperly invading the function and province of the jury.

As noted, *supra,* this Court has not considered the question of what constitutes substantial evidence to go to the jury on the issue of common carrier status under the FELA. In 1920, in holding that Wells Fargo was not a "common carrier" simply by virtue of its leasing a car on a train, this Court stated by way of dictum:

> In our opinion, the words "common carrier by railroad," as used in the Act [FELA], mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad .... *Wells Fargo* v. *Taylor,* 254 U.S. 175, 187-88.

This is the only statement ever made by this Court with respect to what constitutes a common carrier under the FELA. It must be emphasized that this pronouncement was not speaking to the question of what constitutes sufficient evidence to go to the jury on the question of common carrier status. Further, the decision is forty-five years old, was decided prior to the 1939 liberalizing Amendments indicating a congressional purpose that the Act should be given broader scope and effect, and was a product of a period during which the Act was given a "narrow and niggardly construction." *Rogers* v. *Missouri P. R. Co.*, 352 U.S. 500, 508, 509.

In final analysis, the question proposed to this Court in this petition is simply: given the fact that Congress intended to give broad protection to railroad workers who were subjected to the risks of this demonstrably dangerous enterprise, and given the fact that these petitioners are subject to the exact same risks as railroad workers, will it best effectuate the policies of the Act and further the congressional purpose for this Court to recognize that the question of whether a railroad is a common carrier is properly one for a jury to determine, where there are facts in the record capable of supporting such a conclusion? Respondent herein did operate a railroad; it did on a number of occasions carry for the public; it did have "property pertaining to a going railroad." The crucial question is whether it performed, or would have had to perform had the public demanded, enough acts outside of its normal essentially "in-plant" operations to be considered a common carrier under the Act. The Supreme Court of Arkansas held that there was not "substan-

tial evidence" to go to the jury on this question. It is necessary, therefore, to examine this evidence to determine if in so deciding it deprived petitioners of their right to a jury determination under the Act.

The evidence from which the jury could have reasonably concluded that respondent was a common carrier is as follows:

1. The M.&O. R.R. exercised the power of eminent domain in condemning land for a part of the right-of-way. The Arkansas Constitution provides: "All railroads, canals and turnpikes shall be public highways, and all railroads and canal companies shall be common carriers." The right to exercise the power of eminent domain is one of the principal incidents of a "common carrier." (App. 9a).

2. Malvern Gravel Company receives compensation from the Rock Island Railroad for the use of its track and for services performed for the railroad. The Rock Island pays Malvern Gravel Company $5.00 a car for performing switching operations for the Rock Island and for picking up empty cars and delivering the loaded cars back to the Rock Island Railroad at their tracks. Thus, despite the fact that no tariff is published by Malvern Gravel Company, it does receive income for transporting these cars and in so doing, it is acting as a common carrier. (R. 45; 50; 79-80).

3. In 1957 a highway contractor, Reynolds & Williams, located a "batch" plant north of Malvern Gravel Company's plant but located on Malvern's property. Malvern Gravel Company furnished this contractor crushed stone for making cement. Malvern Gravel Company hauled this material by rail to Reynolds and Williams' plant

where it was unloaded. Reynolds and Williams paid Malvern for this material and it is certainly reasonable to assume, as the record reflects (R. 48-49; 74; 95) and the jury could have found, that the transportation cost was taken into consideration by the parties in establishing the contract price of such material.

The railroad cars used to haul this material were leased from the Missouri Pacific and Malvern paid $2.75 per day for the use of the cars. (R. 48; 65-66; 70-73). The sum of all this is that Malvern Gravel Company actually went out and leased railroad cars from another railroad for the purpose of hauling materials to third parties for a consideration. The jury could reasonably have found that by so doing it was acting as a common carrier. The agreement covering the above transaction between Malvern and the Missouri Pacific was still in effect at the time of trial and it would have been reasonable for the jury to infer that Malvern Gravel Company contemplated situations arising in the future making it necessary for them to lease railroad cars from the Missouri Pacific for the purpose of serving others on a commercial basis.

4. The practical effect of the use of Malvern's track also could reasonably be interpreted to establish a common carrier status. Other companies in the area have the right to use the track and it is undisputed that both the Rock Island and Missouri Pacific used the track in servicing other companies. Malvern Gravel Company was party to an agreement with Malvern Brick & Tile Company (no relationship with respondent) providing for joint track maintenance with Malvern Gravel Company receiving compensation in the form of the cost of maintenance and the Brick & Tile Company in turn having the privilege of using the track. (R. 45; 48).

5. In July and August of 1957 three cars of limestone from Neosho, Missouri, consigned to the Arkansas Highway Department, care of Reynolds & Williams, were switched by Malvern Gravel Company over its railroad tracks and unloaded by use of the company crane from a location on the tracks of the Malvern Gravel Company. (R. 66; 74; 95-98).

6. In 1962 several cars of steel beams from Tulsa, Oklahoma, consigned to Fairchild Construction Company were switched by the Malvern Gravel Company over its railroad tracks and unloaded with the aid of the company's crane from a location on the company's tracks. (R. 66; 95-98).

7. In 1963 two cars of cinders consigned to the Malvern Public School were likewise switched by the Malvern Gravel Company over its railroad tracks and unloaded by use of the company's crane from location on the tracks of the Malvern Gravel Company. (R. 66; 74; 96-98).

As noted by the dissent in the Supreme Court of Arkansas:

> Altogether it was shown that over a dozen cars moved in interstate shipment over the tracks of the Malvern Gravel Company. *There is no instance in the record where the Malvern Gravel Company ever refused to do any hauling offered to it by anyone . . .* One isolated incident of hauling over its tracks as a common carrier might not be sufficient but repeated incidents over a number of years, as shown here, certainly made a case for the jury; and the Malvern Gravel Company, a common carrier under the laws of Arkansas, is shown to have repeatedly hauled and transported interstate shipments. (App. 17a). (Emphasis added.)

It is interesting to note the treatment of this question by the majority in the Supreme Court of Arkansas. It simply lists factors 1-4 outlined above without significant comment and dismissed factors 5-7 by concluding that "the gravel company merely did a few friendly acts to help some neighbors." (App. 4-5a). The court never recognized this Court's often repeated admonition, well stated in *Wilkerson* v. *McCarthy,* 336 U.S. 53, that,

> it is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given. *Id.* at 57.

Failing to give the petitioners the benefit of every "reasonable inference" tending to support their case, the court thereafter simply substituted its opinion for that of the jury. In so doing it contravened the teaching of this Court that,

> the focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable . . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results

are more reasonable. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35.

The court also misconstrued the case law relied upon by petitioners. For example, petitioners relied upon the *"Tap Line Cases,"* 234 U.S. 1. The question before this Court in those cases (for our purposes) was whether a number of lumber companies which operated short line railroads were common carriers under the Interstate Commerce Act. Petitioners cited the cases for the Court's holding therein that

> the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. *It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business,* which is the real criterion determinative of its character. *Id.* at 24. (Emphasis added.)

The Arkansas Supreme Court distinguished the *Tap Line Cases* on the basis that the tap lines "are engaged in carrying for hire the goods of all those who see fit to employ them." (App. 5a). In the first place, there were at least two examples in the record in the instant case from which the jury could have determined that Malvern Gravel Company received consideration from others for its transporting operations. In the second place, petitioners only relied on the cases for the Court's enunciation therein concerning the extent of the use required for a finding of common carrier status and for the fact that the case looks to the public's *right to demand* service of the carrier as being the outstanding criterion upon which a finding of common carrier status can be predicated. Further, the tap lines were engaged almost exclusively in transporting logs of the companies that owned the lines, their carrying

for third parties being an extremely minute part of their freight. The cases are thus closely analogous, although construing different Acts.

Malvern Gravel Company meets this test of common carrier status articulated in the *Tap Line Cases*. Under the Constitution of Arkansas, Malvern is clearly a common carrier (App. 3a); under Arkansas Supreme Court decisions the public had a right to *demand* of Malvern Gravel Company, as a common carrier, service and use of its facilities. *Conway Oil & Ice Co.* v. *Gibson Oil Co.*, 175 Ark. 905, 1 S.W. 2d 60; *Helena Southwestern R. Co.* v. *Coolidge*, 169 Ark. 552, 275 S.W. 2d 896. It has conclusively been shown that others did use the gravel company's facilities and that they did demand service. Since the Arkansas Constitution makes Malvern Gravel Company a common carrier; since it is the "right" of the public to demand use and not the extent of use which determines common carrier status; since Malvern Gravel Company could not prove any instance where it *refused* use of its facilities to any individuals or corporations; and since the record is replete with instances when others *did* demand and receive transport of their goods by Malvern, the question of its status was at least one upon which reasonable men could differ, and as such, it was a *question for the jury to determine*, and not one for an appellate court.

In completely ignoring the above line of reasoning, the Supreme Court of Arkansas relied wholly upon lower Federal court decisions in holding that respondent was not a common carrier. (App. 6-7a). However, all of the cases relied upon are subject to one crucial and absolutely distinguishing feature—in none of these cases did the "in-plant" railroads ever carry for anyone other than themselves. None of the cases

concerns the question which faced the Arkansas Supreme Court and which is raised in this petition, i.e., how many actions *in addition to* the carrying of its own goods must a railroad perform before it becomes a common carrier within the meaning of that term under the FELA? In none of the cases cited was there any genuine issue as to a material fact. In the instant case there are numerous facts concerning which there are genuine issues. Such factual issues are properly resolvable only by a jury.

On the other hand, the case of *Kach* v. *Monessen Southwestern Ry. Co.*, 151 F.2d 400 (3d Cir. 1945) establishes the fact that a wholly "in-plant" railroad can be construed as a "common carrier" within the meaning of the FELA, even when it does not carry on any operations for other parties. On facts remarkably similar to those in the instant case, except that defendant's operations were limited to carrying its own goods, the defendant *admitted* that it was a common carrier, the only point there in issue being whether defendant was in interstate commerce.

This Court has not in recent years in any way decreased its vigilance in making certain that the congressional purposes formalized in the FELA should not be eroded.[6] It has recognized Congress' broad and pervasive mandate and has given it effect. It has noted the congressional statement that "this bill relates to common carriers by railroads engaged in interstate commerce . . . . It is intended in its scope to cover all

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[6] *Davis* v. *Baltimore & Ohio R. Co.*, 13 L.ed 2d 594; *Meeks* v. *Georgia So. and Fla. R. Co.*, 12 L.ed 2d 495; *Braswell* v. *The New York, Chi. & St. Louis R. Co.*, 12 L.ed 2d 495; *Dennis* v. *Denver & Rio Grande Western R. Co.*, 375 U.S. 208; *Gallick* v. *Baltimore and Ohio Ry. Co.*, 372 U.S. 108.

commerce to which the regulative power of Congress extends." H.R. Rep. No. 1386, To Accompany HR 20310, 60th Cong., 1st Sess. (1908).

In the instant case respondent is concededly in interstate commerce. Certainly, given the broad remedial purposes of the Act and the fact that Congress intended its scope to cover all commerce to which the regulative power of Congress extends," the Arkansas Supreme Court's decision does not comport either with the congressional mandate or this Court's interpretation of such mandate. "To deprive these workers of the benefit of a jury trial in close . . . cases is to take away a goodly portion of the relief which Congress has afforded them." *Bailey* v. *Vermont Ry. Co.*, 319 U.S. 350, 354.

Petitioners respectfully pray that this Court either grant the petition and reverse the decision on the basis of its recent decisions under the FELA, or that it grant the petition and set this case down for argument so that the important question raised can be resolved.

CONCLUSION

Wherefore, the petitioners pray that a writ of certiorari be granted.

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APPENDIX

APPENDIX A

MALVERN GRAVEL CO. *v.* MITCHELL.

5-3343

Opinion delivered December 21, 1964.

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SAM ROBINSON, Associate Justice. The issue here is whether the appellant, Malvern Gravel Company, is liable under the Federal Employers' Liability Act for injuries sustained by appellees, Arlie Mitchell and James Rogers, who were employees of the gravel company at the time they were injured. There were jury verdicts for the plaintiffs, Mitchell and Rogers. The gravel company has appealed. If there is substantial evidence that the gravel company is a common carrier, within the meaning of the Federal Employers' Liability Act, the trial court was correct in refusing to direct a verdict for appellant, but if there is no substantial evidence that the gravel company is a common carrier within the meaning of the aforesaid Act, the judgments must be reversed.

Mitchell and Rogers, while working in the due course of their employment, were underneath a railway car closing a defective hopper door on a car which belonged to the Missouri Pacific Railroad Company. They were severely injured when an employee of the gravel company, while operating a switch engine, shoved a railway car into the car under which appellees were closing the hopper door.

Mitchell and Rogers, as employees of the gravel company, were awarded compensation under the Arkansas Workmen's Compensation Law, which limits the amount of compensation recoverable. Later, they filed suits in the Hot Spring Circuit Court against the Missouri Pacific Railroad Company, the Malvern & Ouachita River Railroad Company, and the Malvern Gravel Company, alleging that the defendants were common carriers engaged in interstate commerce; that they were, therefore, liable to

appellees under the Federal Employers' Liability Act. Under that Act, notwithstanding the Arkansas Workmen's Compensation Law, there is no limit to the amount of recovery for a personal injury. *Missouri-Kansas-Texas R. Co. of Tex.* v. *Waddles,* 203 S.W. 2d 350; *Schirra* v. *Delaware, L.&W.R. Co.,* 103 F. Supp. 812.

The cases of the plaintiffs against the defendants were consolidated and proceeded to trial. After all parties had rested, the court directed a verdict in favor of the Malvern & Ouachita River Railroad Company, and there is no appeal from the court's action in that respect. The jury returned verdicts in favor of each plaintiff in the sum of $200,000 against the Missouri Pacific Railroad Company and the Malvern Gravel Company. Presumably, the Missouri Pacific settled the judgment against it. In any event, it is not a party to this appeal. Only the gravel company has appealed.

The principal issue, and the only one we reach, is whether the appellant, Malvern Gravel Company, is a common carrier within the meaning of the Federal Employers' Liability Act. Although it is engaged in interstate commerce, if it is not a common carrier as such a carrier has been defined by the Federal Courts, it is not liable under the Act.

The Federal Employers' Liability Act provides: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . ." 45 U.S.C.A., Sec. 51.

The Malvern & Ouachita River Railroad Company, hereinafter called M & O, was issued a charter in Arkansas

as a railway company in 1929. Actually, the M & O did not transport anything for anyone and was incapable of doing so. It only owned a right-of-way of about 1¾ miles with no rails thereon. As rolling stock, it owned one switch engine, but no tracks on which to operate it and no railway cars to pull. It never, at any time, operated as a railroad or as a common carrier within the meaning of the Federal Employers' Liability Act. Although it may have been a common carrier under the provisions of Arkansas Constitution, Article 17, Sec. 1, and because of having exercised the right of eminent domain, it was not a common carrier within the meaning of the Federal Employers' Liability Act. The U.S. Supreme Court has said: "In our opinion, the words 'common carrier by railroad' as used in the act, [Federal Employers' Liability Act], mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by mention of cars, engines, track, roadbed and other property pertaining to *a going railroad.*" *Wells Fargo & Co.* v. *Taylor,* 254 U.S. 175, 41 S. Ct. 93. (Our emphasis.)

In 1932, the Malvern Gravel Company was chartered as a corporation. The incorporators were entirely different from those who had incorporated the M & O in 1929. At the present time, the Malvern Gravel Company owns the controlling stock in the M & O but there is no showing as to when the gravel company acquired the M & O stock. Sam Clark is the president of both companies. He became associated with both companies about 15 years ago. As a corporation, the gravel company is authorized to excavate, mine, quarry and produce, refine, grade, crush, dress, manipulate, amalgamate and prepare for building and construction purposes or otherwise, prepare for market, and to purchase, manufacture, make, acquire, sell or otherwise dispose of, distribute, and generally deal in and with gravel, sand, stone, rock, clays, ores, metals, and vegetable

and mineral substances and building and construction materials of all kinds, etc. It was not authorized to operate as a railway company.

Some time after the Malvern Gravel Company came into existence as a corporation, for the consideration of $2,500 per year, it leased from the M & O, a corporation that had never operated as "a going railroad", the short right-of-way and a railroad engine owned by M & O. The gravel company leased rails from the Missouri Pacific and caused them to be placed on the right-of-way it had leased from the M & O. By using the leased engine, rails and right of way the gravel company has been able to move its products from its plant to a point where they could be placed on the main lines of the Missouri Pacific and Rock Island Railroads, and thus transported in both intrastate and interstate commerce.

The gravel company has never held itself out as a common carrier. In fact, with the exception of a few times, its railway facilities have been used by no one except the gravel company itself. At one time a road contractor had a "batch" plant located on gravel company property near the gravel plant. The gravel company was selling material to the contractor, and used its own railway facilities to deliver, on its own property, the material it was selling to the contractor. About a half dozen other times the gravel company, as a favor, permitted its facilities to be used, on the gravel company property, to unload material purchased elsewhere by others who did not have a convenient place or facilities to unload heavy material. No charge was made for such accommodations. The gravel company merely did a few friendly acts to help some neighbors.

The Missouri Pacific delivered and picked up its cars on the gravel company property. The gravel company, with its engine, picked up empties and delivered the cars that it had loaded with its own material to the Rock Island and was allowed $5.00 per car for doing so. This

was done because the Arkansas Commerce Commission had a rule that a railroad company must do the switching or pay the customer for doing it. The Missouri Pacific did its own switching in connection with the gravel plant, but the Rock Island chose to pay the gravel company for doing it.

The Malvern Brick & Tile Company is near the gravel company property. The railroad track of the gravel company crosses property belonging to the brick company. The brick company also has a locomotive, and uses a portion of the track in question and helps to maintain it. The gravel company never handles any material for the brick company.

Appellant argues that the burden of proof was on plaintiffs, appellees, to show that the Federal Employers' Liability Act is applicable, and appellees concede that they had the burden of proof in that respect.

To sustain their contention that the gravel company is a common carrier, appellees, in their excellent brief, rely to a large extent on what are known as the "Tap Line Cases", 234 U.S. 1. There, a number of lumber companies who operated short line railroads contended that they were common carriers; they held themselves out as such, and maintained that as common carriers they were entitled to a rebate of a part of the tariff collected by the principal railroads hauling the shipments. The Tap Line Cases are easily distinguishable from the case at bar. In those cases the court said: "They [the Tap Lines] are engaged in carrying for hire the goods of all those who see fit to employ them." This statement in itself shows that the tap lines were common carriers. In the case at bar, there is no showing that the gravel company ever held itself out as being willing to haul for others, for hire or otherwise. In fact, the evidence is completely convincing that the gravel company operated the 1¾ miles of railroad solely for the purpose of getting its own products to market, and for no other purpose.

Appellees also rely heavily on *Kach* v. *Monessen Southwestern Ry. Co.*, 151 F. 2d 400, but there the issue was whether the railroad company was operating in interstate commerce, and not whether it was a common carrier.

Appellees cite several other cases as supporting their argument that the gravel company is a common carrier. We have carefully examined all the cited cases. They are distinguishable on the facts, and it would unduly extend this opinion to deal at length with each case. Appellees also suggest that the gravel company is a common carrier because of its close connection with the M & O Railroad.

There are three things that must combine to constitute a common carrier within the meaning of the Federal Employers' Liability Act; (1) a carrier must be engaged in interstate commerce; (2) it must operate a railroad in interstate commerce; and (3) it must operate a railroad as a common carrier.

Even if we should find that the M & O and the gravel company are so closely associated that they could be considered as one company, and that such cases as *Black & White, Inc.* v. *Love*, 236 Ark. 529, 367 S.W. 2d 427, are applicable in that respect, it would not help appellees because according to many decisions of the Federal Courts, neither the M & O or the gravel company, or the two companies operating individually or in concert with one another have ever operated as a common carrier within the meaning of the Federal Employrs' Liability Act. Time and again the Federal Courts have defined a common carrier that comes within the meaning of the Act. We are bound by the decisions of the Federal Courts in that respect. *Chicago, R.I. & P.R. Co.* v. *Wright*, Okla. 1954, 278 P. 2d 830, certiorari denied 75 S. Ct. 581, 349 P.S. 905, 99 L. Ed. 1241.

In *Duffy* v. *Armco Steel Corp.*, 225 F. Supp. 737 (1964), the court held that a defendant is not "a common carrier

by railroad" for purposes of Employers' Liability Act where defendant owned and operated railroad equipment within its manufacturing plant, the equipment being used to transport material over leased right of way. The court said: "The railroad equipment owned and operated by Armco has not been used to transport goods of others, nor has Armco offered their use to the public. Thus, it appears to a certainty that there is no genuine issue as to any material fact in this case. Defendant asserts, and the Court agrees, that defendant although operating in interstate commerce is not a common carrier by railroad." It was held in *Tilson* v. *Ford Motor Co.*, 130 F. Supp. 676 (1955), that where the operation of a railroad by an automobile manufacturer served only the automobile manufacturer, the automobile manufacturer was not a common carrier within the meaning of the Federal Employers' Liability Act.

In *Kelly* v. *General Electric Co.*, 110 F. Supp. 4, the electric company owned rolling stock and tracks and its tracks were partly located in the bed *of a public street* and were connected with those of a railroad common carrier. It shipped goods F.O.B. plant and moved cars partially loaded with goods of others. But it did not hold itself out as a common carrier and did not carry for hire the goods of others. The court held that it was not a common carrier within the meaning of the Federal Employers' Liability Act. There, the court said: "The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determing the status of one as a common carrier is his public profession as to the service offered or performed."

In *Jones* v. *N.Y. Cent. R. Co.*, 182 F. 2d 326 (1950), the court quoted the language of the U.S. Supreme Court in *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175, to the effect that a common carrier for the purposes of the Fed-

eral Employers' Liability Act is one who operates a railroad as a means of carrying for the public.

There is no substantial evidence in the record that appellant or M & O operated a railroad as a means of carrying for the public. In other words, there is no substantial evidence that either or both companies operated as a common carrier within the meaning of the Federal Employers' Liability Act.

Reversed and dismissed.

McFaddin & Johnson, J.J., dissent.

Dissenting Opinion

Ed. F. McFaddin, Associate Justice. The Majority Opinion states the issue in the first paragraph: "If there is substantial evidence that the gravel company is a common carrier, within the meaning of the Federal Employers' Liability Act, the Trial Court was correct in refusing to direct a verdict for appellant, but if there is no substantial evidence that the gravel company is a common carrier within the meaning of the aforesaid Act, the judgments must be reversed." Then in a subsequent paragraph the Majority Opinion has this statement: "There are three things that must combine to constitute a common carrier within the meaning of the Federal Employers' Liability Act: (1) a carrier must be engaged in interstate commerce; (2) it must operate a railroad in interstate commerce; and (3) it must operate a railroad as a common carrier."

I propose to take these three essentials and demonstrate that there is ample and substantial evidence to take the case to the jury on each of these three essentials. It is not for this Court to sit as an appellate jury and render a factual finding on each of these three essentials: it is our duty to determine whether there is substantial evidence to take the fact questions to the jury; and this I now pro-

pose to demonstrate as to each of the three essentials listed in the Majority Opinion, as above quoted.

I. *The Malvern Gravel Company Was A Carrier Engaged In Interstate Commerce.* The proof abundantly shows that the Malvern Gravel Company made carload shipments of gravel over its railroad track from its plant to various states, and transported over its track shipments from outside Arkansas. So the Malvern Gravel Company was engaged in interstate commerce. That the Malvern Gravel Company was a carrier so engaged in interstate commerce is clearly demonstrated by the fact that the Malvern Gravel Company was the same as the Malvern & Ouachita River Railroad, even though they existed as separate corporations.

The record shows that the Malvern & Ouachita River Railroad was incorporated and received its charter from the State of Arkansas on April 30, 1929, ". . . for the purpose of forming a railroad corporation to incorporate, own, construct and operate a short line of railroad necessary to the successful mining quarrying and marketing of stone, rock and other materials . . ." The incorporators certified that 391 shares of the 400 shares were owned by Frank McGillicuddy, and that the railroad would be about four and one-half miles long in Hot Spring County, Arkansas. In order to acquire a part of the right of way, the Malvern & Ouachita River Railroad exercised the power of eminent domain in the Hot Spring Circuit Court in May 1929. So we have an Arkansas railroad corporation exercising the power of eminent domain. Article 17, Section 1 of the Arkansas Constitution states: "All railroads, canals and turnpikes shall be public highways, and all railroads and canal companies shall be common carriers." Notice the language: ". . . all railroads . . . shall be common carriers."

That the Malvern Gravel Company is the same as the Malvern & Ouachita River Railroad is abundantly estab-

lished from the evidence. On April 3, 1931, the *Malvern Gravel Company* entered into a signed contract with the Missouri Pacific Railroad Company. Mr. Frank McGillicuddy—previously stated as owning 391 of the 400 shares of the issued stock of the Malvern & Ouachita River Railroad—signed the agreement as representing both the Malvern Gravel Company and the Malvern & Ouachita River Railroad. The instrument is so enlightening that I copy pertinent excerpts:

"It is understood that the Missouri Pacific, in compliance with recent order of the Arkansas Railroad Commission, desires to perform the service required of it by the Commission's order in connection with the service mentioned in the caption, in lieu of paying to the Gravel Company the allowance prescribed by the Commission, in the event the work is performed by the Gravel Company rather than by the railroad. In order to carry out this arrangement, the following is agreed upon:

"1. The Malvern Gravel Company (Malvern & Ouachita River Railroad Company) will provide track upon which Missouri Pacific engines and cars may be safely operated between the Missouri Pacific main line connection and the loading facilities of the Malvern Gravel Company; the latter being located approximately one and three quarters (1¾) miles from the Missouri Pacific main line. . . .

"2. The Malvern Gravel Company (Malvern & Ouachita River Railroad) will provide suitable track facilities convenient to its plant where empties will be set out by the Missouri Pacific engine and crew, also suitable track or tracks from which loads will be moved by the Missouri Pacific crew. Commercial loads for movement via Missouri Pacific will be placed together by the Malvern Gravel Company (Malvern & Ouachita River Railroad) on designated tracks so that switching in the plant by the Missouri Pacific crew for the purpose of getting this business together, will not be necessary. . . .

"4. The hour or hours at which Missouri Pacific will make trip to plant of the Malvern Gravel Company (Malvern & Ouachita River Railroad) will be agreed upon between representatives of the two companies on the ground, and may be changed from day to day as conditions require, by mutual agreement between these representatives. . . .

"/s/W. E. Lamb, Superintendent—Mo. Pac. RR. Co.

"/s/Frank McGillicuddy, Representing Malvern Gravel Co.

(Malvern & Ouachita River RR. Co.)"

It will be observed that the Malvern & Ouachita River Railroad was the name placed in parenthesis after Malvern Gravel Company in each instance, and this certainly indicates that the two were considered as one. On January 21, 1932, Malvern Gravel Company became a Delaware corporation and on January 25, 1932, it qualified to do business in Arkansas, and has so remained. On June 1, 1934, Malvern Gravel Company leased from the Missouri Pacific Railroad Company track materials consisting of 27,114 lineal feet of steel rails, and also angle bars, frogs, guard rails, switch plates, and other such materials for operating a railroad. The charter of the Malvern Gravel Company did not authorize it to construct a railroad track, yet it did so because its alter ego, Malvern & Ouachita River Railroad, needed a railroad track. In the present case Mr. Sam R. Clark testified that he was President of both companies. I copy excerpts from his testimony.

"Q. State your name, please sir.

"A. Sam R. Clark.

"Q. Mr. Clark, are you connected with the Malvern Ouachita River Railroad in any way?

"A. Yes, sir. I'm president of both companies.

"Q. What do you mean both companies?

"A. Malvern Gravel Company and Malvern Ouachita River Railroad Company.

"Q. All right. Mr. Clark, what operations are carried on by the Malvern and Ouachita River Railroad Company? Do they carry on any operations at all?

"A. No, it's just a book corporation is all it is . . .

"Q. For what purpose was that railroad incorporated?

"A. It is my understanding that the only reason the railroad was incorporated was to condemn the right of way from the plant site to the Missouri Pacific switching yards. . . .

"Q. What is the relationship between the Malvern and Ouachita River Railroad Company and the Malvern Gravel Company?

"A. Malvern Gravel Company owns stock in the company.

"THE COURT: What was your answer?

"A. I said the Malvern Gravel Company owns stock in the company. There's a hundred shares of stock in the Malvern Ouachita River Railroad Company and the Malvern Gravel Company owns 97 shares of that stock. I own a share and my wife owns a share and Wilburn Cox owns a share. According to Arkansas Law there has got to be three incorporators, so Malvern Gravel Company owns all the stock except the three shares.

"Q. Does Malvern Gravel Company have any lease with the Malvern Ouachita River Railroad Company?

"A. Yes, sir.

"Q. What is the rental on that lease?

"A. Twenty-five hundred per year.

"Q. Do you rent all the facilities of the Malvern and Ouachita River Railroad Company?

"A. Yes, sir.

"Q. How long have you been operating under that lease, ever since you have been there?

"A. Ever since I have been there, and I don't know how long before that. I have been there for 15 years. . . .

"Q. Your Malvern and Ouachita River Railroad Company rents or leases its track and other material to the Malvern Gravel Company, is that correct?

"A. Yes, sir.

"Q. And you pay $2,500.00 per year on that lease?

"A. Yes, sir.

"Q. What other property does the Malvern and Ouachita River Railroad Company own beside the track down there?

"A. They own about three different parcels of right of way along that railroad.

"Q. Well, what other personal property do they own?

"A. They own the locomotive.

"Q. They own the locomotive?

"A. Yes, sir.

"Q. Now that's the locomotive that does the switching down there, is that correct?

"A. Yes, sir.

"Q. That is in the Malvern Gravel Company plant down there?

"A. Yes, sir. . . .

"Q. Who is president of Malvern & Ouachita River Railroad Company?

"A. I am.

"Q. How long have you been president of it?

"A. Roughly I would say about six or eight years.

"Q. Do you have a board of directors for Malvern and Ouachita River Railroad Company ?

"A. Yes, sir.

"Q. Would you name some of the individuals on that board?

"A. I am on the board and Frank Riley and Bill Riley was on the board. We haven't replaced him. He is deceased.

"Q. Now, is this the same board that operates the Malvern Gravel Company?

"A. Yes, sir."

The State and Federal income tax returns of Malvern & Ouachita River Railroad were introduced in evidence. These showed the only income of the Malvern & Ouachita

River Railroad to be $2,500.00 per year, which it was testified was the lease money paid to it by the Malvern Gravel Company.

The fact that the Malvern Gravel Company and the Malvern & Ouachita River Railroad are separate corporations affords the Malvern Gravel Company no immunity, because courts disregard the fiction of the corporate entity in order to do justice. This is discussed in detail in 13 Am. Jur. p. 160 *et seq.*: "A subsidiary or auxiliary corporation which is created by a parent corporation merely as an agency for the latter may sometimes be regarded as identical with the parent corporation, especially if the stockholders or officers of the two corporations are substantially the same or their systems of operation unified." This principle of disregarding the claim of separate corporations has been applied to railroad companies. In *Chicago, Milwaukee RR. Co.* v. *Minneapolis Civic Assn.*, 247 U.S. 490, 62 L.Ed. 1229, the United States Supreme Court held that a railroad company owning what are obviously merely terminal or spur delivery tracks in a city and which is a mere agency or instrumentality of two other railroad companies entering the city which owned its capital stock and controlled its operations, cannot be regarded as an independent public carrier merely because it is technically a separate legal entity. In *Buie* v. *Chicago R. I. Ry. Co.*, 95 Tex. 51, 65 S.W. 27, 55 L.R.A. 86, the Supreme Court of Texas held that when one corporation makes use of another as its instrument through which to transact its business, the principal corporation is really represented by the agent of the sub-corporation and its liability is the same as if it had done business in its own name.[1]

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[1] In 1 A.L.R. 610 there is an annotation entitled: "Disregarding corporate existence"; and in Section III of that annotation there are given many instances wherein courts have considered the parent company and the subsidiary company to be one and the same. To the same effect see also annotations in 34 A.L.R. 599 and 63 A.L.R. 2d 1055.

The Arkansas Supreme Court has pierced the fiction of the corporate entity when justice so demanded. Some of these cases are: *Rounds and Porter* v. *Burns,* 216 Ark. 288, 225 S.W. 2d 1; *Plant* v. *Cameron,* 228 Ark. 607, 309 S.W. 2d 312; and *Black & White* v. *Love,* 236 Ark. 529, 367 S.W. 2d 427. In *Rounds and Porter* v. *Burns, supra,* we pierced the fiction of separate corporate entities, and held the parent corporation liable for the debt of its subsidiary because the parent corporation manipulated the subsidiary "to its own advantage at the expense of the appellee. Under the principles already stated this conduct entitles the appellee to a judgment directly against the parent corportation without regard to the separate entity of the subsidiary." In *Plant* v. *Cameron, supra,* we held the parent corporation (Cameron) liable for the debt of the subsidiary corporation (Nashville), saying: "Though the corporations are separate legal entities it would constitute a constructive fraud in this case to allow Nashville to now claim an entirely separate existence from Cameron." In *Black & White* v. *Love, supra,* there were two taxicab companies, one being Black & White and the other being Checker Cab Company. Love sued Black & White which defended on the ground that only Checker Cab Company was liable. We affirmed a judgment against Black & White, saying: "Furthermore, the two corporations were owned by the same shareholders, operated by the same officers, and the cabs were interchanged. It would be putting fiction above right and justice to allow Black & White to hide behind the corporate entity of Checker in this case."

The evidence is clear that Malvern Gravel Company and Malvern & Ouachita River Railroad were one and the same corporation, and that Malvern Gravel Company was a carrier engaged in interstate commerce.

II. *The Malvern Gravel Company Operated A Railroad In Interstate Commerce.* As previously stated, the evidence showed beyond peradventure of a doubt that the Malvern Gravel Company's railroad received and trans-

ported over its railroad tracks, with its engine, carload shipments from outside Arkansas, and also shipped its products over its railroad tracks onto the Missouri Pacific track; and these cars moved in interstate commerce. So, clearly, the Malvern Gravel Company was operating a railroad in interstate commerce. There is no necessity to further dwell on this point.

III. *The Malvern Gravel Company Operated a Railroad As A Common Carrier.* I now point out some of the instances in the record where evidence was introduced that the Malvern Gravel Company acted as a common carrier:

(a) Pursuant to a tariff filed with the Arkansas Commerce Commission, the Rock Island Railroad paid to the Malvern Gravel Company $5.00 a car for the services which Malvern Gravel Company rendered the Rock Island Railroad in picking up empties at Abco (a switching point) and bringing the loaded cars back to that point. Thus, the Malvern Gravel Company received, and is receiving, $5.00 per car from the Rock Island Railroad for switching cars over the tracks of the Malvern Gravel Company.

(b) The Malvern Brick & Tile Company uses a part of the railroad track of the Malvern Gravel Company under a joint maintenance agreement.

(c) In 1957 two cars of limestone from Neosho, Missouri, consigned to the Arkansas Highway Department, were switched by the Malvern Gravel Company over its railroad tracks and unloaded from a location on the tracks of the Malvern Gravel Company.

(d) In 1962 several cars of steel beams from Tulsa, Oklahoma, consigned to Fairchild Construction Company, were likewise switched by the Malvern Gravel Company over its railroad tracks and unloaded from a location on the tracks of the Malvern Gravel Company.

(e) In 1963 two cars of cinders from Strawn, Arkansas, consigned to the Malvern Public School, were likewise

switched by the Malvern Gravel Company over its railroad tracks and unloaded from a location on the tracks of the Malvern Gravel Company.

Altogether it was shown that over a dozen cars moved in interstate shipment over the tracks of the Malvern Gravel Company. There is no instance in the record where the Malvern Gravel Company ever refused to do any hauling offered to it by anyone. The fact that the Malvern Gravel Company did not post tariffs does not prevent it from being a common carrier. One isolated incident of hauling over its tracks as a common carrier might not be sufficient but repeated incidents over a number of years, as here shown, certainly made a case for the jury; and the Malvern Gravel Company, a common carrier under the laws of Arkansas, is shown to have repeatedly hauled and transported interstate shipments.

The Majority Opinion cites the following cases as instances in which a corporation was held to be outside the Federal Employers' Liability Act. These cases are: *Duffy* v. *Armco Steel Corp.*, 225 F. Supp. 737; *Tilson* v. *Ford Motor Co.*, 130 F. Supp. 676; *Kelly* v. *General Elec. Co.*, 110 F. Supp. 4; and *Jones* v. *N.Y. Central*, 182 F. 2d 326. In none of these cases[2] was there a factual situation like that in the case at bar; so I forego discussing them. As aforesaid, there is no instance ever shown wherein Malvern Gravel Company refused to haul interstate shipments over its tracks; and there are repeated instances, as above mentioned, wherein the Malvern Gravel Company actually did haul interstate shipments over its tracks. I submit that

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[2] The Majority Opinion states: "Time and again the Federal Courts have defined a common carrier that comes within the meaning of the Act. We are bound by the decisions of the Federal Courts in that respect." I maintain that the Arkansas Supreme Court is "bound" only by the decisions of the United States Supreme Court. The decisions of other Federal Courts are only persuasive.

these instances are enough to submit the issue to the jury for decision as to whether the Malvern Gravel Company operated a railroad as a common carrier.

Conclusion

This is a long dissent, but the Majority Opinion strikes at the very heart of our jury system. As an appellate Court we are not to decide what we think the evidence shows in a jury case: we are to decide whether there was substantial evidence to take the factual issue to the jury for its decision. Because I believe so thoroughly in the jury system, I cannot in good conscience remain silent when I see a fact question decided by the appellate court instead of by the jury as the Constitution provides.

Therefore, I respectfully dissent.

Johnson, J., joins in this dissent.